No. 71-7601

Supreme Court, U.S.
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In the Supreme Court of the United States

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OCTOBER TERM, 1971

DOMINIC CORTINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN POWERS CROWLEY
105 West Adams Street
Chicago, Illinois 60603
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Dominic Cortina respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 15, 1971.[1]

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[1] Petitions for Certiorari have been filed by the petitioner's co-defendants, John Philip Cerone, Sr., James Cerone, Donald Angeline, Joseph Ferriola, these petitions are adopted herein so far as they are applicable to this petitioner.

Opinion Below

The judgment of conviction of the United States District Court for the Northern District of Illinois is not reported. The opinion of the Court of Appeals for the Seventh Circuit has not yet been officially reported. It is printed as Appendix "A" to this Petition.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on September 15, 1971. A timely Petition for Rehearing was denied on November 9, 1971, Appendix "B".

The jurisdiction of this Court is invoked under and pursuant to 28 U.S. Code 1254(1).

Questions Presented

1. Was the petitioner deprived of his Sixth Amendment right to cross-examination by the admission of hearsay testimony?

2. Was the petitioner denied his right to cross-examination and due process by allowing the chief witness for the government to corroborate himself by testimony of prior consistent acts?

3. Was the petitioner denied his fundamental rights under the Fifth Amendment by allowing the government to comment upon his failure to testify?

Statement of Facts

The evidence viewed in the light most favorable to the government is set forth in the opinion by the United States Court of Appeals for the Seventh Circuit attached to this petition as Appendix "A".

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION BY THE ADMISSION OF HEARSAY TESTIMONY.

The witness Bombacino, according to the Government's admission, was working as an agent for the Government during the entire period covered by his testimony in this case. Acting as an agent for the Government he could not be a co-conspirator, *Sears* v. *United States*, 343 F.2d 139 (5th Cir. 1965).

However, under the pretended authority of *United States* v. *Rizzo*, 418 F.2d 71 (7th Cir. 1969) the Government was allowed to introduce, through the mouth of Bombacino, statements allegedly made by Aureli to Bombacino which were incriminatory of the defendant Cortina.

Bombacino testified that he worked with Aureli from June or early July 1965 at the South Sawyer address until October, when he had a conversation with Aureli. Bombacino testified: (Tr. 99-101)[1]

> "Q. What were your duties when you were working at 4355 South Sawyer?
>
> A. I would help answer the phone and take bets.
>
> Q. How long did you continue on a daily basis to go to 4355 South Sawyer?
>
> A. Till about the middle of October.

[1] Reference to (Tr. .....) are to the Transcript of Proceedings in the District Court.

Q. What, if anything, happened at that time?"

* * *

"A. Frank Aureli told me that 'We're going to be moving to Maywood' and that we wouldn't be working—I wouldn't continue picking up the sheets at Johnny Manzello anymore, and he said we should be moving in a day or two.

By Mr. Casey:

Q. Did he say anything else?

A. That we'd be working for Don Angelini and Dom Cortina."

Motions for mistrial and for severance were made and denied (Tr. 102-145).

Bombacino then testified that the move was made to Maywood and he was introduced to John DiDominico by Aureli. The following then occurred: (Tr. 150-152).

"Q. Did you have a conversation at that time?

A. Yes, I did.

Q. How long was it after you moved to 321 West Lake?

A. The same evening, I believe.

Q. Was the conversation during the day time or during the evening?

A. While we were working inside.

Q. And it was at 321 West Lake?

A. Yes, sir.

Q. Was there anyone else present?

A. No, sir.

Q. Will you please relate the conversation, indicating what you said and what Frank Aureli said.

* * *

A. I said Frank Aureli introduced me, and I asked him who he was, and he said he was the bookkeeper for Dominic Cortina and Don Angelini.

Mr. Crowley: Objection, your Honor.

The Court: Overruled.

Miss Lavin: The motion I made before, your Honor.

The Court: Motion denied.

You may have a continuing motion, if you like, and all of the defendants may join in it, with the Court's ruling in mind, if you so desire, and the record will show it, and the motion will be overruled.

Mr. Busch: I understood that that had been the ruling, that there is a continuing objection on the part of all defendants.

The Court: Miss Lavin made another one, so I just wanted to remind her that we have it in the record, and it is of record.

All right.

By Mr. Casey:

Q. What were DiDominco's duties, if you know?

A. Why, he would come every evening about 5:00, 5:30, and I would see him every Sunday.

Q. What would he do every evening at 5:00 and 5:30?

A. He would get—pick up the betting records.

Q. Take them away?

A. Yes, sir.

Q. What, if anything, would he do on Sunday?

A. He would help answer the phone and just hang around.

Q. When you say "answer the phone," what do you mean?

A. Taking bets."

Later Bombacino again testified to certain conversations with Aureli incriminatory of Cortina, when he described a meeting with the unindicted co-conspirator, Sammy Molose. (Tr. 157-158).

"Q. When did you meet Sammy Molose?

A. I met him when he come to work at 6955 West Grand.

Q. Were you introduced to him?

A. Yes, I was.

Q. Who introduced you to him?

A. Frank Aureli.

Q. How long after you moved to 6955 West Grand?

A. Just when we did move, about a day after we were there.

* * *

Q. Was there anyone else present other than you, he and Frank Aureli?

A. No, sir.

Q. Was there a conversation at that time?

A. Well, Frank Aureli told me he was a good friend of Dominic Cortina's and he was going to teach him the business."

Bombacino also testified that in February of 1966 he had another conversation with Aureli concerning Cortina. (Tr. 184-185)

"Q. Will you please relate the conversation indicating what you said and what Aureli said..

A. Well, Frank Aureli told me that either the betting was getting too heavy, the customers couldn't get him through the phones, and Dominic was looking for a new phone, and I suggested to Frank Aureli ask Dominic if I could use my phone in my home.

Q. What did he say?

A. Frank Aureli said, you know, you are on five years' probation. Are you willing to take bets at your home, and I said yes, it is all right, I will take them at my home.

Q. What did he say?

A. He said, all right, I will let you know.

Q. Did you have a further conversation with him later?"

* * *

"A. Frank Aureli told me that it is all right, get yourself a phone, and you will be taking all out-of-town sports action at your house."

In July of 1966, Aureli was arrested. After he was released he allegedly had a conversation with Bombacino. (Tr. 196)

"Q. Will you please relate the conversation indicating what you said what he said.

A. I asked him when he got out, and he said he had just got out, and I asked him if he called his sister Kate because she was worried, she knew he was locked up because she kept calling me two or three times a day, and he said Dominic Cortina had a hard time getting hold of the attorneys, and that was why the delay."

Each of these alleged conversations, occurring between October, 1965 and July 1966, all incriminatory of Cortina were prior to the time that Bombacino allegedly met Cortina.

Cortina could not call his co-defendant Aureli as a witness *United States* v. *Housing Foundation of America*, 176 F.2d 665, 666 (3rd Cir. 1949); *United States* v. *Echeles*,

352 F.2d 892, 897-898 (7th Cir. 1965). Thus, under the guise of attempting to establish the conspiracy charged, the Government was allowed to introduce evidence of statements of a co-defendant incriminatory of the defendant Cortina. There was no way that he could exercise his right of cross-examination.

In *United States* v. *Cimino*, 321 F.2d 509 (2nd Cir. 1963) the Court was concerned with the identical situation presented here and held that such statements are not admissible.

> "Witnesses for the prosecution proved the meetings between Cimino and D'Ercole on November 10 and 22 but no witness overheard their conversations or saw anything passed from one to the other.' Their mere meeting was no evidence of their being conspirators; nor was Cimino's statement to Avant (Government Agent) that Joe Z (D'Ercole) was 'the source' of the heroin sold by Cimino competent evidence against D'Ercole. 'Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence.' See Glasser v. United States, 315 U.S. 60, 74-76, 62 S.Ct. 457, 86 L.Ed. 680." (Parenthesis added).

United States v. *Cimino*, 321 F.2d 509, 510.

The tactic of the Government in this case is almost identical to that condemned by this Court in *Douglas* v. *Alabama*, 380 U.S. 415. Douglas had been indicted with a co-defendant, Loyd, who was tried first and found guilty. In Douglas' trial, the State called Loyd as a witness. However, Loyd refused to testify, relying on his privilege against self-incrimination. The State then, under the guise of cross-examination, read Loyd's confession, which was incriminatory of Douglas, to him and after reading portions of the confession would pause and ask Loyd, "Did

you make that statement?" Each time he was asked this question, he refused to answer. This Court held this procedure to violate Douglas' Sixth Amendment right to cross-examination, and in reversing, stated at page 419:

> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder."

The recurrent problem of admission of hearsay statements in a conspiracy case reached its prejudicial climax in this case.

We respectfully submit that this case presents a proper vehicle for review of the issues presented in, and left unresolved in *Bostic* v. *United States*, cert. granted, 400 U.S. 991; dismissed as improvidently granted, 402 U.S. 547.

II.

THE CHIEF WITNESS FOR THE GOVERNMENT WAS ALLOWED TO TESTIFY THAT HE HAD CONTACTED THE F.B.I. AFTER CERTAIN MEETINGS WITH THE DEFENDANTS. THIS TESTIMONY WAS, IN EFFECT, A PRIOR CONSISTENT STATEMENT AND ITS ADMISSION WAS ERROR.

The witness Bombacino testified to alleged meetings and conversations with the defendants Aureli, Angelini and Cortina during the period from July, 1965 through December, 1966. (Tr. 65-208). He then testified that in December of 1966, after talking to "Lefty" and then Aureli

by telephone, that he called F.B.I. Agent Paul Frankfort. (Tr. 112). After his first alleged meeting with Jack Cerone he again called Frankfort (Tr. 230). He then testified that the next day he saw Cerone again, after which he talked to Aureli and then Frankfort (Tr. 240). Later that evening after meeting Jack Cerone and Joseph Ferriola he again called Frankfort (Tr. 242).

Frankfort was never called to testify about any surveillance conducted as a result of these telephone calls. The clear import of this testimony was the introduction of a prior consistent statement. There was no other conceivable purpose for the questions and answers. The prosecution was allowing the jury to conclude, indeed the only conclusion, that Bombacino had told the same story to the F.B.I. contemporaneously with the alleged event and therefore he must be telling the truth now.

In *Schoppel* v. *United States*, 270 F.2d 413, 417 (D.C. Cir. 1959) the Court condemned this type of prosecutorial misconduct:

> "A feature of the trial, . . . was the prosecuting attorney's disclosing to the jury the fact that certain of his witnesses had been interviewed and made statements to the F.B.I. The contention is that this was the prosecutor's way of bolstering the witness' testimony by indicating to the jury that consistent declarations had been made to the investigators. Repeatedly the U.S. Attorney, upon calling a witness to the stand, proceeded first to establish that a statement had been given to the F.B.I. and then handed it to defense counsel, in the presence of the jury.
>
> Where a cross-examiner has endeavored to discredit a witness by prior inconsistent statements, it is sometimes permissible to offset the damage by showing prior consistent utterances. 4 Wigmore §1132, 6 Wigmore §1792 (3rd Ed. 1940). It is not

proper, however, in chief to seek corroborative support of a witness by showing that after the event under inquiry and before the trial he made statements to the same effect. See 4 Wigmore §1124 (3rd Ed. 1940).

The tactic of the government attorney must be condemned. . . ."

See also: *Gregory* v. *United States,* 369 F.2d 185, 191 (D.C. Cir. 1966); *Throckmorton* v. *St. Louis-San Francisco Ry.Co.,* 179 F.2d 165, 169 (8th Cir. 1950).

The Court of Appeals refused to comment on this allegation of error and therefore there is a conflict among the Circuits.

III.

THE PETITIONER WAS DENIED HIS FUNDAMENTAL RIGHT UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S COMMENT IN CLOSING ARGUMENT ON HIS FAILURE TO TESTIFY.

In order to properly set forth this point of error a very brief recital of a portion of the evidence is necessary.

Bombacino had testified that shortly before the move to Lake Street Aureli told him that they would start using dissolving paper which they would obtain from Jack "Arbor's" printing shop at about 4300 West Madison (Tr. 153).

Jack Garber, a printer who had a shop located at 4325 West Madison Street in 1965 and 1966 was later called to testify (Tr. 1058 et seq.). At the time of trial Garber had great difficulty with his eyesight. He testified that he knew Frank Aureli for 15 years, yet he had to be as-

sisted in walking through the courtroom to identify Aureli (Tr. 1058).

"Q. Mr. Garber, I am going to ask you to come off the stand the best you can and walk around the courtroom and see if you can see Frank Aureli in the courtroom today.

Mr. Marshal, could you assist him, please?

(Witness did as requested.)

Mr. Calihan: Your Honor, I just talked to my client. He says he knows the man. I think he is under some difficulty. We would agree that he would identify Frank Aureli.

The Court: All right. Let the record show that the witness has identified the defendant Frank Aureli. Thank you, Mr. Calihan.

(Witness resumed the stand.)"

He then testified that Aureli and Bombacino had been in his printing shop (Tr. 1060-1065). He also testified that Aureli brought him some dissolvable paper and Garber printed lines on it. (Tr. 1066-1067). About three months later Aureli, according to Garber, came in with a man named Dominic and requested similar printing and that Dominic picked it up a few days later (Tr. 1067-68). He was then requested to leave the witness stand to see if he could identify Dominic. The defendant Cortina did not concede the identification, as had Aureli, but remained seated while Garber made his arduous trip through the courtroom, which consumed a great deal of time. The witness then identified Cortina. (Tr. 1068).

In closing argument, the prosecutor referred to this incident (Tr. 1880-1881).

"About the time of this move, Bombacino tells us that the operation began using a new paper, a paper known as dissolvable paper. Aureli told Bombacino

that they would henceforth be using this dissolving paper. Aureli tells Bombacino that he is to go to Jack Garber's printing shop, about 4300 West Madison, and pick some up.

What is the use of this paper? Very simple. Just as Mr. Garber described it, it dissolves in water. What do we find at Lake Street and what do we find at the Grand Avenue places? Buckets of water. Bombacino said in case of a police raid, in the bucket—phfft—disappeared. Evidence. Potential evidence—again we see these defendants are looking forward to this day.

Did Bombacino lie about this? Did he exaggerate in any way, any way? The only one that he knew connected with it was Aureli. Nobody else. But we have more than that. Jack Garber.

I don't know that I will ever see anything more dramatic than Jack Garber. He walked in front of you people, everybody there, everybody there, 'til he got right over there, and there is the man he pointed to that came in with Aureli, the man whom he only knew as Dominic, the defendant Cortina. *We saw Mr. Cerone stand right away when the witness DeLucia was asked, but Cortina waited, and he waited, and he waited, and we waited.* (Emphasis added)

Mr. Crowley: Your Honor, I am going to object to that comment and move for a mistrial now.

The Court: Overruled.

Mr. Crowley: I may state the ground later at sidebar?

The Court: You may." (See: Tr. 1910-1911).

This argument had a two-pronged prejudicial effect.

The testimony of Ricca had been expressly limited to Jack Cerone, Sr. (Tr. 879). It is of course well settled that limiting instructions have little, if any, salubrious

effect on a jury. *Bruton* v. *United States,* 391 U.S. 123, but whatever effect they may have in this case they were emasculated by the prosecutor's comment.

Secondly, this argument was a clearly impermissible comment on the petitioner's right not to incriminate himself. The petitioner had entered a plea of not guilty and the prosecution was required to prove his guilt beyond a reasonable doubt, included in that proof is proof of identity. *Salley* v. *United States,* 353 F.2d 897 (D.C. Cir., 1965). To call upon the petitioner to assist the Government in its proof, indeed to criticize him for not assisting, is prejudicial error in the highest degree. *Griffin* v. *California,* 380 U.S. 609.

Conclusion

For the foregoing reasons the petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN POWERS CROWLEY
105 West Adams Street
Chicago, Illinois 60603
Attorney for Petitioner